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IN THE SUPREME COURT OF THE UNITED STATES

No. 81-1514

OCTOBER TERM 1982

STATE OF ALABAMA,

PETITIONER,

VS.

CHARLES BRACEWELL,

RESPONDENT.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

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QUESTION PRESENTED

DOES THE DECISION OF THIS HONORABLE COURT IN BECK V. ALABAMA, 447 U.S. 625 (1980), REQUIRE THE AUTOMATIC RETRIAL OF ALL CASES TRIED UNDER THE ALABAMA CAPITAL PUNISHMENT STATUTE PRIOR THERETO WITHOUT REGARD TO THE EVIDENCE?

PARTIES

In the Circuit Court of Covington County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were: The State of Alabama, Petitioner Herein, and Charles Bracewell, Respondent herein.

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CONSTITUTIONAL PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> ". . . All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law..."

STATUTORY PROVISIONS INVOLVED

Code of Alabama, 1975, Title 13, Sections 13-11-1 through 13-11-9.

STATEMENT OF THE CASE

Respondent, Charles Bracewell, was convicted under Alabama's Death Penalty Statute of the robbery-intentional killing of Rex Carnley and sentenced to death. The conviction and sentence was affirmed by the Alabama Court of Criminal Appeals in an opinion issued January 30, 1979. The Alabama Supreme Court, on petition, remanded the case to the trial court to determine whether or not a juror in

the case, in spite of her attitude towards capital punishment, could have considered the evidence and instructions of the court and returned a verdict of guilty if warranted. The Alabama Supreme Court further held that the sentencing authority misapplied an aggravating circumstance and should reconsider its finding that the capital felony was committed for pecuniary gain. Application for Rehearing was overruled on September 7, 1979. The case was remanded by the Court of Criminal Appeals on October 16, 1979. Upon the trial Court's actions in this regard, the Court of Criminal Appeals affirmed again in an opinion dated January 22, 1979.

On March 6, 1981, the Alabama Supreme Court reversed and remanded on the authority of Beck v. Alabama, 447 U.S. 625, (1980). Then on April 10, 1981, the Court issued an Order overruling application for rehearing, withdrawing its opinion of March 6, 1981, and reversing and remanding the case to the Court of Criminal Appeals for further consideration in light of Beck, supra. On August 4, 1981, the Court of Criminal Appeals reversed and remanded the cause to the trial Court on authority of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), on remand, Ala. 396 So.2d 645 (1981), and Ritter v. State, Ala. S.C. No.

77-798 (Ms. May 8, 1981), Ala. Cr. App., No. 1 Div. 837 (Ms. June 23, 1981). Application for rehearing was overruled on October 6, 1981.

On October 20, 1981, the State filed a Petition for Writ of Certiorari in the Alabama Supreme Court. That writ was denied on December 11, 1981, without opinion.

STATEMENT OF THE FACTS

The facts indicate that Rex Carnley, deceased, died on August 15, 1977. On the evening of August 14, 1977, Mrs. Carnley locked him inside his rural store in Covington County, Alabama. She padlocked the front door of the store by locking a padlock on the outside as she left the store. The body of Carnley was discovered the next morning, August 15, 1977, inside the store, and the front door was open. There were no witnesses to the alleged shooting of Carnley.

Charles Bracewell was arrested in November, 1977, on an unrelated charge, and any confession he might have made implicating he and his wife, Debra Bracewell, in this matter, was made either while Charles was in jail or in the custody of some sheriff of the State of Alabama. Moreover, any

alleged confession of Charles Bracewell was induced by law enforcement officers offering to let him see his wife, Debra Bracewell, who was also in jail and who had been implicated in the same alleged crime.

The Death Penalty Statute Charles Bracewell was tried under included the "Preclusion of Lesser Included Offenses" clause.

ARGUMENT

I. THIS COURT'S DECISION IN BECK V. ALABAMA CONTROLS THIS CASE.

As stated in the Statement of the Case, the Alabama Court of Criminal Appeals, after remandment by the Supreme Court of Alabama, and after careful review and consideration, reversed and remanded this case for a new trial on authority of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L.Ed. 2d 392 (1980) and Ritter v. State, Ala. 403 So.2d 154 (1981).

This case was tried and prepared for trial by counsel for Respondent laboring under the Alabama Death Penalty Statute which included the "Preclusion of Lesser Included Offenses" clause. This mere fact alone affected Respondent's

counsels' approach to preparation for and trial of the case. Stated differently, Charles Bracewell was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions. This fact known to Respondent and his counsel before trial controlled preparation for trial and trial strategy at trial. Petitioner argues that in Ritter v. State, three Justices of the Alabama Supreme Court, a majority, concluded that the Beck decision did not mandate the reversal of a pre-Beck conviction in the unusual case where the record affirmatively and undisputably eliminates any possibility that the defendant was harmed by the existence of the Preclusion clause. Of course, these three Justices were outvoted by a six member majority which concluded that the Beck decision compelled the reversal of all pre-Beck capital convictions regardless of the facts. For the reasons just stated, the majority of the Alabama Supreme Court was absolutely correct in that but for the Preclucion Rule, facts might or would have been stated differently, trial strategy might or would have been different, and

even evidence of lesser included offenses might or would have been presented by the Respondent. That is the thrust of the argument that mandates a trial for Charles Bracewell in this case, particularly in view of the fact that there were no witnesses whatsoever to the alleged shooting of Carnley;and Charles Bracewell, an uneducated man, allegedly made confessions jointly implicating he and his wife, Debra Bracewell, while either in the "black-hole" of the Covington County, Alabama, jail, or while being transported from the Coffee County, Alabama, jail to the Covington County, Alabama, jail, shackled and in the custody of Alabama sheriff's deputies.

Petitioner states: "However, had the Preclusion Clause never existed, this case would still have presented the Respondent's jury with the same choice." In the following sentence Petitioner then states: "The evidence provided no basis for lesser included offenses." These two sentences taken separately make precisely the point for reversal. First, it is absolutely untrue that had the Preclusion Clause never existed this case would still have presented the Respondent's jury with the same choice. That statement just does not make sense in that

but for the Preclusion Clause Respondent's defense would not have been unduly restricted with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions. Consequently, assuming for argument's sake but not conceding that the evidence provided no basis for lesser included offenses, the reason for this is that the Preclusion Clause prohibited Respondent's entitlement to a jury instruction on lesser included offenses.

This case, Charles Bracewell's case, is one at which his life is at stake. This Court, in Beck v. Alabama, 100 S.Ct. 2382, 2389 (1980), stated it very succinctly when the Court said:

> "Death is a different kind of punishment from any other which may be imposed in this country . . . .From the point of view of the defendant, it is different in both its severity and its finality. . . To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."

Precisely, at the trial of Charles Bracewell in

Covington County, Alabama, it was the unavailability of a lesser included offense instruction that renders Alabama's Preclusion Clause unconstitutional and entitles Charles Bracewell to a new trial.

CONCLUSION

For the reasons stated, the Respondent prays that the Petition of the State of Alabama be denied.

John B. Givhan

Griffin Sikes

CERTIFICATE OF SERVICE

I, John B. Givhan, a member of the Bar of the Supreme Court of the United States and one of the attorneys for Respondent, Charles Bracewell, do hereby certify that on this 6 day of May, 1982, I did serve the requisite number of copies of the foregoing on the Attorneys for Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

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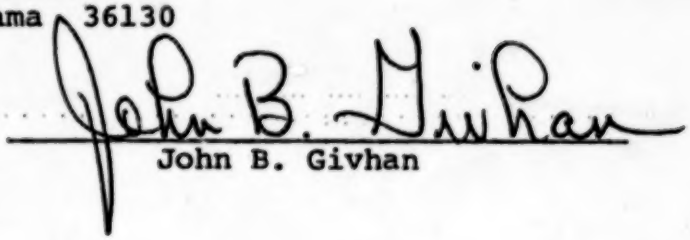

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